

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

WILLIAM B. DICKSON CO. AND
PORT OF TACOMA,

Appellants,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB NO. P 92-224

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW,

This matter came on for hearing before the Pollution Control Hearings Boards on Wednesday, June 30, 1993, in the Board's offices in Lacey, Washington. Board Chairman Harold S. Zimmerman, Attorney Member Robert Jensen, and Member Richard Kelley were in attendance with Administrative Appeals Judge John H. Buckwalter presiding. Proceedings were recorded by Louise Becker, Certified Shorthand Reporter, of Gene Barker & Associates of Olympia, Washington.

At issue was a \$2,000 civil penalty imposed by the Puget Sound Air Pollution Control Agency (PSAPCA) on the William B. Dickson Company (Dickson) and the Port of Tacoma (the Port) for alleged violations of PSAPCA's Regulation I.

Appearances for the parties were:

Douglas W. Hales, Attorney, for Appellants.

Keith D. McGoffin and Laurie Halvorson, Attorneys, for
PSAPCA.

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1 Witnesses were sworn and testified, exhibits were examined and
2 admitted, and a closing argument was filed with the Board by Appellant
3 on July 13, 1993. None was filed by Respondent PSAPCA. From these,
4 the Board makes these

5 FINDINGS OF FACT

6 I

7 The Port of Tacoma owns property (hereinafter the site) located
8 at about the 3000 block of Marshall Avenue, a public roadway in the
9 Tacoma Tideflats industrial area, Tacoma, Washington.

10 II

11 At the time of the alleged violations, April 17, 1992, Dickson
12 was under a \$40,000 contract with the Port to perform hauling
13 operations for the Port.

14 III

15 On April 17, 1992, at approximately 2:55 p.m., Victor Aguilar
16 Jr., an Inspector for PSAPCA on that date and for the prior 21 years,
17 was driving on Marshall Ave. when he saw vehicles swerving and he,
18 himself, had to maneuver around a mud and rock deposit covering the
19 lanes of the Avenue about two to three inches thick starting at the
20 site and continuing for approximately 50 yards and then tapering off
21 for approximately another 250 yards.

22 IV

23 Aguilar then observed that trucks were being loaded on the site,
24
25

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1 that the site was wet, softened, and rutted, that these trucks were
2 moving onto Marshall Avenue, that the trucks bore the name Lige and/or
3 Dickson, and that they were depositing mud and rocks on the Avenue
4 from their wheels and undercarriages.

5 V

6 Aguilar contacted a Mr. Ratcliffe, Chief of the Port, who
7 confirmed that the site was owned by the Port. Aguilar then notified
8 him of the conditions at the site and on Marshall Avenue and that a
9 notice of violation would be issued. Mr. Ratcliffe advised Aguilar
10 that he, Ratcliffe, would go to the site and take care of the problem.

11 VI

12 At approximately 4:00 p.m., Aguilar returned and saw Port
13 personnel at the site. The deposit condition on Mashall Ave. was
14 still the same as at his initial observation at 2:55 p.m.

15 VII

16 On both his 2:55 and 4:00 visits, Aguilar observed that the
17 deposited materials were wet or damp and that he saw no evidence of
18 dust being generated therefrom.

19 VIII

20 Dickson employee, Richard Todd, testified that he washed off the
21 deposit from Marshall Street at approximately 4:30 p.m. at which time
22 he saw no dust.

IX

On April 20, 1992, Aguilar contacted Mr. Richard Dickson and notified him of the April 17 conditions and informed him that a notice of violation would be forthcoming. Mr. Randy Asahara, Dickson's Project Manager and overseer at the site, then informed Aguilar that Dickson had washed the deposit off the Avenue and that this was completed by 5:00 p.m. of April 17.

X

On April 22, 1992, PSAPCA issued Notice of Violation No. 27545 to Dickson and to the Port, followed by Notice and Order of Civil Penalty No. 7683, issued to both appellants imposing a \$2,000 civil penalty for alleged violations of Section 9.15(b) of PSAPCA Regulation I.

XI

Any Conclusion of Law deemed to be a Finding of Fact is incorporated as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

The Board has jurisdiction in this matter. RCW's 43.21B.110, 43.21B.310, and 70.94.431.

II

Because this is an appeal of the imposition of a civil penalty, the burden of proof lies with the respondent, PSAPCA. WAC 371-08-183.

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1 III

2 The Washington Clean Air Act, 70.94 RCW is a strict liability
3 statute, and acts violating its implementing regulations (here, PSAPCA
4 Regulation I), are not excused on the basis of intent or lack
5 thereof. Pearson Construction v. PSAPCA, PCHB No. 88-186, 1989.

6 IV

7 By the Notice and Order of Civil Penalty issued by PSAPCA on
8 November 20, 1992, Dickson was charged with violation of PSAPCA
9 Regulation I, subparagraph (b) of SECTION 9.15 FUGITIVE DUST:
10 EMISSION STANDARD which states in its entirety:

11
12 (a) It shall be unlawful for any person to cause or allow
13 the emission of fugitive dust unless such person uses the
best available control technology to control the emissions.

14 (b) It shall be unlawful for any person to cause or allow a
15 vehicle to be operated on a paved roadway open to the
public:

16 (1) Unless such vehicle is so constructed or loaded as
17 to prevent any of its load from dropping, sifting,
leaking, or otherwise escaping therefrom,...

18 (2) With a load of dirt, sand, gravel, or other material
19 susceptible to being dropped, spilled, or otherwise
escaping therefrom unless it is covered or has
20 adequate freeboard so as to prevent spillage.

21 (3) With deposits of mud, dirt, or other debris on the
22 vehicle's body, fenders, frame, undercarriage, wheels
or tires.

23 Deposits of particulate matter on a paved roadway open to
the public shall be prima facie evidence of a violation of
24 Section 9.15(b).

25 ((c) is not relevant to the matter at hand.)

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V

In the same Notice, the Description of the alleged violation was:

Caused or allowed the deposit of particulate matter, mud and rocks, on a paved, public roadway from vehicle tires and undercarriage in the 3000 block of Marshall Avenue in Tacoma, Washington.

VI

Appellant does not deny that the deposits were caused by Dickson trucks as alleged. However, Appellant does argue that, where there was no evidence of resultant fugitive dust from the deposits, there was no threat to the cleanliness of the air, and that, therefore, Section 9.15(b) exceeds the statutory authority of the agency by alleging a violation of the Clean Air Act, 70.94 RCW where no threat to the air exists.

VII

In considering this issue, whether Section 9.15(b) exceeds PSAPCA's statutory authority, we turn first to certain relevant definitions:

"Air contaminant" means dust, fumes, ...other particulate matter, ... RCW 70.94.030 (1); Reg I, 1.07(d).

"Air pollution" means the presence in the outdoor of one or more air contaminants in sufficient quantities and of such characteristics and duration as, or is likely to be, injurious to human health, plant or animal life, or property or which unreasonably interferes with enjoyment of life and property....RCW 70.94.030(2); Reg. I, 1.07(e).

VIII

While fugitive dust, as treated generally in Section 9.15, is properly considered an "air contaminant" which would lead to "air

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1 pollution", the depositing of materials on a roadway does not per se
2 create fugitive dust and, consequently, does not create air pollution.
3 Here, the un rebutted testimony shows that there was, in fact, no
4 fugitive dust polluting the air because of the wetness of the
5 deposited materials.

6 IX

7 Even though the Board, itself, may question whether the dropping
8 of deposits on a public road without resulting fugitive dust emissions
9 is violative of the Clean Air Act, it is not within our jurisdiction
10 to declare that a Regulation, on its face, is invalid and
11 unenforceable because it exceeds PSAPCA's statutory authority.

12 X

13 Accordingly, the Board, within its jurisdiction parameter, must
14 conclude that PSAPCA Regulation I, Section 9.15(b) is enforceable and
15 that Dickson did, in fact, violate that regulation as alleged.

16 XI

17 However, the Board also concludes that because there was no proof
18 of fugitive dust or any other air contaminant being released into the
19 air and no apparent detrimental effect on the cleanliness of the air,
20 the civil penalty in this matter should be mitigated. We issue the
21 following Order as a signal to both parties: to PSAPCA that it should
22 consider whether Section 9.15(b) as it stands on its own is a
23 statutorily enforceable section of its Regulation I, and to Dickson
24 that it exercise more care in its trucking operations to prevent a
25

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1 recurrence of depositing materials on the roads which could dry into a
2 fugitive dust air pollutant.

3 XII

4 Any Conclusion of Law which is deemed to be a Finding of Fact is
5 incorporated as such. From these Conclusions of Law, we enter the
6 following

7 ORDER

8 THAT the alleged violation of PSAPCA Regulation I, Section
9 9.15(B) is affirmed, and,

10 That the civil penalty is mitigated to \$100.

11 Done this 22nd day of July, 1993.

12 POLLUTION CONTROL HEARINGS BOARD

13 
14 HAROLD S. ZIMMERMAN, Chairman

15 
16 ROBERT V. JENSEN, Member

17 
18 RICHARD C. KENLEY, Member
19

20 PRESIDING OFFICER
21 JOHN H. BUCKWALTER
22 Administrative Appeals Judge
23
24
25

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